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November 17, 1995
In reply ref: 95111701.CSC

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

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FCC MAIL ROOM

Subject: *Notice of Proposed Rulemaking No. FCC 95-443*
IB Docket No. 95-168, PP Docket No. 93-253
RE: Revision of Rules and Policies for the Direct
Broadcast Satellite Service

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Dear Mr. Caton:

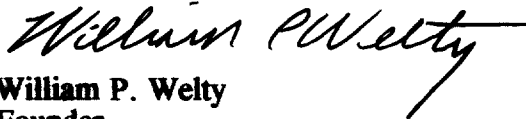
On 30 October 1995 the Commission released the above-captioned *Notice of Proposed Rulemaking*. Comments are due on Monday, 20 November 1995.

Enclosed is an original and nine copies of our *Comments of Continental Satellite Corporation Concerning Notice Of Proposed Rulemaking ("Comments")* in the above-captioned matter. Please distribute the extra copies directly to the Commissioners.

Kindly direct any questions concerning this matter to the undersigned.

Very truly yours,

For CONTINENTAL SATELLITE CORPORATION



William P. Welty
Founder

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**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of
Notice of Proposed Rulemaking
Revision of Rules and Policies
for the Direct Broadcast Satellite
Service

IB Docket No. 95-168
PP Docket No. 93-253

Adopted: October 27, 1995
Released: October 30, 1995

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NOV 20 1995

FEDERAL ROOM

**COMMENTS OF CONTINENTAL SATELLITE CORPORATION
IN RE NOTICE OF PROPOSED RULEMAKING (FCC 95-443)**

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**COMMENTS OF CONTINENTAL SATELLITE CORPORATION
IN RE NOTICE OF PROPOSED RULEMAKING (FCC 95-443)**

1. By its Chief Executive Officer and by its Founder, Part 100 Ku-band DBS permittee Continental Satellite Corporation, a California corporation, hereby files these *Comments of Continental Satellite Corporation In RE: Notice of Proposed Rulemaking* (hereafter, "Comments").

I. BACKGROUND

2. On 18 October 1995 the Commission released *Memorandum Opinion and Order FCC 95-428* (hereafter, "Memorandum") in which the Commission denied an *Application for Review* that had been submitted by Advanced Communications Corporation (hereafter, "ACC"). ACC's *Application for Review* requested that the Commission reverse the International Bureau's dismissal of ACC's DBS construction permit.

3. In its *Memorandum*, the Commission upheld the International Bureau's actions in dismissing ACC's DBS construction permit. Furthermore, the Commission announced that it intended to open a window for new applications for DBS authorizations relating to the 27 DBS channels previously held by ACC and to the 3 DBS channels for which authorizations had never been assigned. The Commission cited as one of its "primary goals"¹ for opening these 30 DBS channels to public auction its desire "to expedite the provision of additional DBS service in order to foster competition both among DBS providers and between DBS and cable."² The Commission also opined that

opening a window for new applications for DBS authorizations for [ACC's canceled] channels (and orbital positions), and then deciding among mutually exclusive applications by auction, will best serve the public interest.³

The Commission's October 30 *Notice of Proposed Rulemaking* (hereafter, "NPRM") is intended to serve as the vehicle by which the Commission sets forth its rationalization for its proposal to auction most of the DBS channels formerly authorized for service by ACC, plus another DBS channel that was previously unassigned to any operator.

**II. THE PROPOSED AUCTION WILL
INHIBIT COMPETITION, NOT ENHANCE IT.**

4. In these *Comments*, Continental will argue *against* the Commission's proposal to implement an auction of the DBS channels taken away from ACC and *for* their distribution equitably among eligible surviving permittees, as the Commission promised it would do in *Continental Satellite Corp.* [4 FCC Rcd 692, 6299 (1989), *partial recon. denied*, 5 FCC Rcd

1. *Memorandum* at Para. 3, line 7.

2. *Memorandum* at Para. 3, lines 7-8.

3. *Memorandum* at Para. 3, lines 4-6.

7421 (1990)]. We present this argument because the Commission, by proposing to destroy the most effective methodology to enhance competition in the Ku-band for DBS program delivery after having cancelled ACC's permit, now claims that it will enhance competition by auctioning the newly available channels to the highest bidder. Our view is that the proposed auction will actually *inhibit* competition, not *enhance* it.

5. If the Commission implements its proposal to auction the available DBS channels, the American public will undergo the paradoxical fate of having the *competitors* to the winning bidder play a determinative role in setting the rates that customers will pay for DBS services provided by the auction winner. That's because the auction losers, in their losing bids, will bid up the price of the "auction", thus in effect setting the amount of "voluntary tax" debt that eventually must be amortized by the auction winner through its subscription rates. These subscription rates will be incrementally higher than those of the existing DBS operators, who will not have been burdened by having to pay the tax that the Commission euphemistically labels a "public auction". The real loser in the "public auction" will be the American people whose interests are *supposed* to be protected by the Federal Communications Commission. The auction winner's customers will pay higher rates than customers of Continental, DBSC, DirectSat, DirecTV, EchoStar, USSB, and other DBS players, thus abrogating the Commission's "primary goals"⁴ of expediting "provision of additional DBS service in order to foster competition both among DBS providers and between DBS and cable."⁵

III. WHAT'S BEHIND THE PUBLIC AUCTION?

6. We have previously noted our concerns that an unpublished agenda informs the Commission's decision to utilize a public auction to allocate the available DBS channels. In our letter of 26 June 1995 to the Commission, we noted that:

The political contingency of public auction is doubtlessly the most significant temptation that could influence the current Commission to break promises made during the previous administration. With the 1996 elections looming in the near future, and with political pressures facing the Clinton administration to act decisively to help balance the ballooning federal deficit (and increase the likelihood of a re-election) the politically expedient course of action for the near term might be to create the appearance of fiscal responsibility by auctioning off the thirty DBS channel assignments that are now vacant. Such an auction of DBS spectrum might be penny-wise, but it would also be pound-foolish. In the short term, hundreds of millions of dollars -- perhaps several billions of dollars -- could be generated by public auction of DBS channel frequencies that were originally handed out to the existing permit and license holders virtually for free. But such a move might result in a long term nightmare.

- ▶ *First*, any new permit holders would have to start their due diligence from "scratch". This means that the sixth round permittees won't be commencing operations much before the year 2000 at the earliest.

4. *Memorandum* at Para. 3, line 7.

5. *Memorandum* at Para. 3, lines 7-8.

- ▶ *Second*, any public auction of DBS spectrum⁶ could result in an unintended backlash: auctions might make the value of the business opportunities of the original permittees so attractive that the Commission's action would spark an "Oklahoma land rush" of participants who would seek to buy in to the industry through the back door of the existing permittees.

This second possibility raises the specter of what some industry rumors are reporting is the "real reason" behind the International Bureau's dismissal of Advanced's construction permit: so-called "inordinate profits" for warehousing spectrum. ... The wages of such regulatory jealousy is imprisonment of the American public within the prison cell of a politics of envy.

In addition to these observations, we observe three component elements within the Commission's unpublished agenda seeking a public auction of the unassigned DBS channels.

**1. THE COMMISSION'S PROPOSAL IMPLEMENTS THE FIRST
FEDERAL TAX ON TELEVISION BROADCAST SERVICES,
CLEVERLY DISGUIISING IT AS A "PUBLIC AUCTION"**

7. *First*, the Commission's proposed public auction amounts to a subtle and dangerous attempt to implement the first true federal tax on television broadcast services. What masks the charade from being detected as a federal tax on television broadcast services is that the Commission is calling the "tax" a "public auction". Presumably the Commission thinks that making a tax voluntary removes its nature of being a tax and converts that tax into an auction price. Voluntary taxes masquerading as "public auctions" are still taxes, no matter how much doublespeak is used to disguise them. Because they are taxes on free speech, public auctions for DBS broadcast services should be prohibited as a violation of the first amendment rights of the American public and of the DBS permittees and licensees who will be operating the DBS channels.

**2. THE COMMISSION INTENDS TO EXERCISE ITS
AUCTION POWER MERELY BECAUSE SUCH
AUTHORITY HAS BEEN BESTOWED UPON IT**

8. *Second*, because the proposed public auction accomplishes *nothing* to assist the Commission to meet its policy goals with respect to the DBS industry, we reluctantly conclude that the proposed auction will be implemented merely because the Commission has been granted authority to hold such an auction. As we will observe in greater detail below, in its *Memorandum*, the Commission set

6. A footnote in our letter of 26 June 1995 stated at this point: "These so-called "auctions" are really penalty taxes on free enterprise. They make it impossible for entrepreneurs to participate in an arena where the pioneering efforts of high-risk takers have paved the way for other businesses to participate at a later date."

7. *Letter of Continental Satellite Corporation* dated 26 June 1995.

three important policy goals for DBS service: (1) efficient use of a valuable public resource (DBS channels); (2) promotion of DBS as a competitor to cable; and (3) prompt delivery of DBS service to the public.⁸

But in its *Memorandum* the Commission presents absolutely no evidence that "the record in this proceeding, the development of DBS service and technology since 1989, and [the FCC's] new auction authority"⁹ will expedite or accelerate the implementation of these goals. In fact, we contend that because the auction fees paid will have to be amortized by the auction winner through its own DBS operational revenues, the public auction will actually result in *discouraging* DBS competition to the terrestrial cable industry rather than *promoting* such competition.

3. THE AUCTION SEEMS TO BE A POLITICAL PLAY FOR REVENUE ENHANCEMENT

9. *Third*, the auction masks a political ploy for revenue enhancement. A shortsighted attempt to bring a rumored \$700 million into the United States Treasury just before the 1996 Presidential elections tempts both Republican and Democratic interests in the US Congress to take the credit for "reducing the deficit" by the amount of funds which are hoped for. Both political parties are posturing to take credit for the windfall: the Clinton administration will try to take the credit because the money will come into the Treasury during his tenure. The Republicans will attempt to take the credit because they control the Congress. No matter who takes the credit, the American viewing public will be the losers because the winner of the auction will recoup their auction fees through incrementally higher prices to their customers.

IV. SIX LOGICAL FLAWS WHICH INFORM THE COMMISSION'S MISPLACED COMMITMENT TO PUBLIC AUCTION

10. The methodology set forth in *Continental* is the most effective and practical system for equitable distribution of DBS channels, even though our firm's progress toward commencement of DBS operations has been delayed more than any other DBS permittee as a direct result of that methodology. It is clear from even a cursory analysis of the Commission's 30 October 1995 *NPRM* that the Commission's apologetic in favor of public auction of the remaining unassigned DBS channels is based on the Commission's 18 October 1995 *Memorandum*. It is imperative, therefore, to analyze the Commission's thinking set forth in the *Memorandum* as part of these *Comments*. Because the Commission's primary rationale for instituting a public auction is set forth in Paragraphs 66-74 of the *Memorandum*, we will confine our observations concerning the *Memorandum* to these nine paragraphs only.

8. *Memorandum* at Para. 67, lines 1-3.

9. *Memorandum* at Para. 66, lines 3-4.

**1. THE COMMISSION DEMONSTRATES NO SOUND
BASIS FOR CONCLUDING THAT THE CURRENT ASSIGNMENT
METHOD NO LONGER SERVES THE PUBLIC INTEREST**

11. In its *Memorandum*, the Commission cites only three bases for making its determination that the current "assignment method appears no longer to serve the public interest."¹⁰ These bases are "the record in this proceeding, the development of DBS service and technology since 1989, and our [*i.e.*, the FCC's] new auction authority."¹¹ A careful examination of each of these three bases for the Commission's determination that a public auction of the remaining 30 unassigned DBS channels will best serve the public interest reveals that each of them are unsound. Here's why: The Commission has set "three important policy goals for DBS service: (1) efficient use of a valuable public resource (DBS channels); (2) promotion of DBS as a competitor to cable; and (3) prompt delivery of DBS service to the public."¹² While each of these are laudable goals, the Commission has failed to prove that any of them -- particularly the Commission's third stated goal of initiating prompt delivery of DBS service to the public -- have been harmed by the current method for distributing DBS channels.

**2. THE COMMISSION ACTUALLY AFFIRMS THAT FIVE OF
THE EIGHT DBS PERMITTEES WILL BE OPERATIONAL BY THE
END OF NEXT YEAR, BUT THEN ILLOGICALLY INSISTS THAT
THIS SUCCESS JUSTIFIES AUCTIONING REMAINING CHANNELS
INSTEAD OF DISTRIBUTING THEM TO THE CURRENT PERMITTEES**

12. In its attempt to rush to a public auction, the Commission ignores its own admitted conclusion that a total of five of the eight surviving DBS permittees (DirectSat, DirecTV, EchoStar, TEMPO, and USSB) will be operational within the next seven months. A sixth permittee (DBSC) will be operational by the middle of 1997. In its *Memorandum*, the Commission notes accurately that "Two permittees (DIRECTV and USSB) already have their DBS systems in operation, and a third (EchoStar/DirectSat) is to launch one satellite this fall and another in 1996. Tempo Satellite is scheduled to launch in June 1996."¹³

13. But the Commission fails to conclude by this line of reasoning that only about seven months from now five of the eight remaining permittees will be fully operational, with six of the eight operational by the middle of 1997. By keeping the promises made in *Continental*, if the Commission were to assign five of the thirty available DBS channels to DBSC (which launches in mid-1997), five channels to DirectSat (which launches in late 1996 or early 1997), five channels to EchoStar (which launches in late 1996 or early 1997), and five channels to TEMPO (which launches in mid-1996, then twenty of the thirty available channels would be operational by next summer and twenty-five of the thirty channels would be operational by the summer of 1997. With *Continental* being assigned the remaining five channels, the last five remaining channels will become operational in late 1997 or early 1998.

10. *Memorandum* at Para. 66, line 5.

11. *Memorandum* at Para. 66, lines 3-4.

12. *Memorandum* at Para. 67, lines 1-3.

13. *Memorandum* at Para. 24, lines 1-4.

3. THE COMMISSION NEGLECTED TO CONSIDER THAT ALL CURRENT DBS PERMITTEES HAVE BUILT INTO THEIR EXISTING SPACECRAFT DESIGNS SUFFICIENT CAPACITY TO CONTAIN NEW DBS CHANNEL DISTRIBUTIONS SO THERE WILL BE NO DELAY OF SERVICE IMPLEMENTATION TO THE VIEWING PUBLIC BY DISTRIBUTING RECLAIMED DBS CHANNELS TO THE SURVIVING PERMITTEES.

14. The Commission's decision to seek a public auction of the remaining DBS channels instead of distributing them to the surviving eligible permittees fails to consider that these permittees have already built into their spacecraft designs enough added transponder carriage capacity sufficient to accommodate the additional channels that could be distributed in accordance with the Commission's promises in *Continental*. Consider, for example, that:

- ▶ Continental Satellite's design will carry sixteen transponders to orbit, even though it is only authorized to operate on eleven channels.

Accordingly, Continental can receive five more channels without changing its design and without resulting in any occasion for delay of service implementation to the viewing public.

- ▶ DBSC has designed its system to carry sixteen -- or even thirty-two DBS channels -- even though it is only currently authorized to operate on eleven channels.

Accordingly, DBSC can receive five more channels without amending its design specifications and without resulting in any delay of service implementation to the viewing public.

- ▶ The EchoStar/DirectSat spacecraft have been designed to operate sixteen DBS channels on each satellite -- for a total of thirty-two operational channels, even though together they are only currently authorized to operate on 22 channels.

Accordingly, EchoStar/DirectSat can be assigned ten more channels without having to amend their spacecraft design specifications and without resulting in any occasion for delay of service implementation to the viewing public.

- ▶ The same is also true of TEMPO. Their spacecraft can accommodate more channels without modification to the design specifications and without resulting in any occasion for delay of service implementation to the viewing public.

If Dominion Video's request to move "out of the back yard" at 61.5° West Longitude were granted, TEMPO's design could also accommodate *all* of Dominion Video's transponders and still leave room for a "ride to orbit" for USSB, should TEMPO be allowed to move to 110° West Longitude and should those companies wish to enter into negotiations for such transport.

4. THE COMMISSION COULD DISTRIBUTE THE UNALLOCATED DBS CHANNELS IN SUCH A WAY THAT ALL DBS CHANNELS COULD BE OPERATIONAL NO LATER THAN MID-1998. HERE'S ONE WAY:

SLOT	CURRENT CHANNEL ALLOCATIONS		ONE POSSIBLE REDISTRIBUTION	
61.5°	Continental 11 DBSC 11 Unassigned 2 Dominion 8	O 1-21 E 2-22 C 23-24 C 25-32	Continental 16 DBSC 16	O 1-31 E 2-32
101°	DirectTV 27 USSB 5	C 1-23 O 25-31 E 24-32	DirectTV 27 USSB 5	C 1-23 O 25-31 E 24-32
110°	Advanced 27 DirectSat 1 Unassigned 1 USSB 3	C 1-23 O 25-31 E 24 E 26 E 28-32	TEMPO DBS 21 Dominion 6 Dominion 2 USSB 3	C 1-21 C 22-27 O 29-31 E 28-32
119°	EchoStar 21 TEMPO DBS 11	C 1-21 C 22-32	EchoStar 32	C 1-32
148°	Advanced 24 USSB 8	C 1-17 O 19-31 E 18-32	TEMPO DBS 17 USSB 8 TEMPO DBS 4 Dominion 3	C 1-17 E 18-32 O 19-25 O 27-31
157°	DirectTV 27 Unassigned 5	C 1-22 E 24-32 O 27-31	DirectTV 27 Dominion 5	C 1-22 E 24-32 O 23-31
166°	Continental 11 Unassigned 2 Dominion 8 TEMPO DBS 11	O 1-21 E 2-4 E 6-20 C 22-32	Continental 16 DBSC 16	O 1-31 E 2-32
175°	EchoStar 21 DBSC 11	O 1-21 C 23-32 E 2-22	EchoStar 32	C 1-32

15. For the sake of counter argument, let us presume that the "extreme luck bordering on divine intervention"¹⁴ that Commissioner Quello predicts would be necessary to meet "the unrealistic timetable set forth in the majority decision"¹⁵ (i.e., in the *Memorandum*) were to be realized. In such a hypothetical circumstance, the Commission's public auction slated for 18 January 1996 would then take place.¹⁶ But under such circumstances, the Commission has already admitted that a four or five year timetable will be necessary in order for the sixth round permittees to begin operations because the new permittees will have to start their spacecraft design and build programs from scratch. The existing permittees will have been operational for at least a year -- and probably a lot longer than that -- by the time the *first* of the new auction winners are enabled to commence their DBS operations. However, if the Commission were to distribute the unassigned DBS channels to the surviving eligible permittees as it originally promised -- i.e., to Continental, to DBSC, to EchoStar/DirectSat, and to TEMPO, all 30 currently unassigned DBS channels should be fully operational by mid-1998. Significantly, the specific 27 channels at 110° West Longitude could be operational by the middle of next year.¹⁷

14. *Dissenting Statement of Commissioner James H. Quello In the Matter of Advanced Communications Corp.* (hereafter, "*Quello Statement*") at Para. 7.

15. *Quello Statement* at Para. 7.

16. The timetable set by the Commission in the *NPRM* is indeed hypothetical. ACC has appealed its case to the federal courts. Unless Commissioner Quello's "divine intervention" occurs, there will be no auction on 18 January 1996. And there probably will be no auction for years to come. Meanwhile, the revoked and never-assigned DBS channels will remain unused and unallocated, thus depriving the American public of the use of the valuable DBS resource formerly authorized for operation by ACC.

17. DirecTV is *theoretically* eligible to receive five of the thirty channels distributable by the Commission in accordance with the promises extended to the surviving permittees in *Continental*. We have omitted DirecTV as an eligible permittee in the distribution chart on the previous page because under the Commission's proposed cross ownership restrictions, DirecTV would be ineligible to operate full-CONUS DBS channels outside of 101° West Longitude. We also consider it unlikely that USSB would be willing to move to 110° West Longitude in order to accommodate an assignment of five additional DBS channels to its competition. Therefore we have assumed, for the purposes of this argument, that the Commission would not assign DirecTV five additional channels. Also, DBSC, DirectSat, EchoStar, and TEMPO can each receive only five additional channels for a total of sixteen DBS channels because they only requested operational authority for sixteen DBS channels in their original DBS applications. Continental, on the other hand, originally asked for authority to operate on sixteen paired partial-CONUS DBS channels and eight full-CONUS channels. Accordingly, Continental is eligible to receive five unassigned full-CONUS channels at 110° West Longitude. A methodology by which Continental could effectuate operational authority at 110° West would presumably be arranged if the Commission were to distribute the available channels pursuant to *Continental*. Options available to Continental that would result in its channels at 110° becoming operational by the middle of 1996 include sale of such operational authority to TEMPO, accepting a "ride to orbit" by TEMPO, or lease of channel capacity to TEMPO or to another programmer. Launch by Continental of a fifth DBS spacecraft to 110° West Longitude pursuant to a modification of its construction permit to accommodate another satellite at 110° West Longitude would result in a delay of commencement of service at 110° West Longitude by Continental until mid-1998.

**5. THE COMMISSION BASES ITS CLAIM TO PUBLIC NECESSITY
FOR A DBS CHANNEL AUCTION ON THE FALSE CONCLUSION THAT
THE EXISTING ASSIGNMENT METHODOLOGY IS INADEQUATE.**

16. The Commission claims that the existing "method of accommodating all applicants appears to have created significant delay in making DBS orbital/channel assignments."¹⁸ This claim is false, because if unassigned paired DBS channels were distributed to the surviving eligible DBS permittees, 20 of the east-CONUS/full-CONUS channels would be operational by mid-1996, 25 would be operational by mid-1997, and 30 would be operational by late 1997 or mid-1998 at the latest.

17. The Commission claims that the existing methodology encourages permittees to "put construction of a DBS system on hold while waiting for a clearer picture of ultimate orbital/channel assignments to emerge."¹⁹ The Commission then fails to substantiate this charge by presenting even a single piece of evidence to support this fantastic claim. The truth is that no current DBS permittee has stopped work on their DBS system in order to wait "for a clearer picture" to emerge of any aspect of the DBS industry. For a permittee to do so would be to risk falling out of due diligence and suffering the fate that befell ACC.

18. The Commission claims that the existing methodology's format that allows "requests for extension of time, modification requests, and transfers or assignments all require independent review by the Commission, in addition to the analysis of each permittee's due diligence demonstration."²⁰ This claim is correct. But such requests for extension of time, modification requests, and transfers of assignment can occur -- and no doubt will occur -- after a public auction also. Adopting a posture of holding a public auction will not cure the Commission's existing bureaucratic inefficiencies.

19. The Commission states that if it were to keep the promises it made in *Continental*, "six permittees would be assigned four paired channels each, further complicating the already fractured distribution of DBS channels."²¹ We have shown, *supra*, that this premise is false. Existing spacecraft designs of all eligible permittees except DirecTV can accommodate additional DBS channels with no modification of existing satellites. If the Commission were to adopt its proposed rule to disallow permittees from operating channels in split orbital allocations, DirecTV would be ineligible to receive any more channels. Thus the Commission could split the remaining DBS channels among the other eligible permittees equitably so that all spacecraft currently planned for can be launched with a full accommodation of operational transponders.

20. The Commission fears "that assigning channels pursuant to *Continental* will indefinitely delay completion of the last DBS processing round,"²² but never bothers to substantiate the evidence that could make that fear credible. The truth is that *all existing*

18. *Memorandum* at Para. 69, lines 1-2.

19. *Memorandum* at Para. 69, lines 8-9.

20. *Memorandum* at Para. 69, lines 12-14.

21. *Memorandum* at Para. 70, lines 5-7.

22. *Memorandum* at Para. 71, lines 1-2.

eligible permittees (Continental, DBSC, EchoStar/DirectSat, and Tempo) designed their spacecraft with the probability in mind that they would be assigned additional DBS channels. Each of the permittees took the business risk that such a probability might eventually be realized. **None of the fifth round permittees**, however, planned for the contingency that the Commission would break its promise to them. Non-operational transponders carried to orbit are a profound waste of design time, build effort, and launch expense unless these costs can be mitigated by retaining the possibility of receiving a reward for taking the risk of building them into the spacecraft design. The possibility that additional DBS channels might be assigned or that other permittees might take a "ride to orbit" (as did USSB with DirecTV) makes the design risks of adding potentially unusable transponders worth taking.

21. One more observation made by the Commission in its unworkable attempt to show that the existing methodology is impractical needs to be addressed. It is this: the Commission has publicly admitted that the "existing permittees' DBS plans may be sufficiently flexible to incorporate additional channels".²³ Paradoxically, the Commission attempts to use this admission to argue *against* assigning these channels to those permittees!²⁴ Its rationale for this illogical argument is the Commission's desire "to usher in a new era of DBS service to the public, in which DBS orbital/channel assignments are swiftly utilized and the public reaps the full benefit of DBS spectrum resources."²⁵ If the Commission truly wishes to usher in this "new era of DBS service to the public", it should "swiftly" assign the newly available DBS channels among existing permittees Continental, DBSC, EchoStar/DirectSat, and TEMPO.

6. THE COMMISSION DOES NOT MEET FEDERAL CRITERIA WHICH MUST BE MET BEFORE PUBLIC AUCTION OF THE AVAILABLE DBS CHANNELS MAY BE AUTHORIZED

22. Perhaps the most telling logical flaw in the Commission's intent to conduct a public auction of the available DBS channels is the simple fact that the Commission has not met its own criteria by which it may exercise auction authority. In order to authorize a public auction, the Commission must prove that an auction will meet four minimum objectives. The Commission's proposed public auction meets none of these four criteria.

23. *First*, the Commission must demonstrate that its proposed public auction to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays."²⁶ But we have already noted, *supra*, that the "deployment of new technologies" spoken of in this criteria (*i.e.*, the commencement of DBS operations on the newly available channels) will not be implemented any more rapidly by auction than by their distribution to the surviving eligible permittees. In fact, we have noted that the surviving eligible permittees are actually *better equipped* to meet the objective of "rapid deployment" called for in this federal statute than would public auction.

23. Memorandum at Para. 73, lines 5-6.

24. Memorandum at Para. 73, lines 6-13.

25. Memorandum at Para. 74, lines 7-10.

26. 47 U.S.C. § 309(j)(3)(A).

24. *Second*, the proposed auction must assist in "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."²⁷ That the Commission claims that the above federal criterion will be met by a public auction of ACC's confiscated DBS channels is perhaps the most untenable of all of the Commission's claims. How much "smaller" could a "small business" be than one in which there exists only one shareholder (Dan Garner), who owns 100% of the stock in ACC? Because ACC is clearly a "small business" and therefore is specifically addressed in the above federal statute, for the Commission to remove ACC's authorization to be a DBS operator is to *violate* the very federal statute listed above which the Commission has the audacity to claim it is fulfilling by announcing a public auction! This hypocrisy is unconscionable.

25. *Third*, the auction must optimize "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource."²⁸ The Commission has not demonstrated that the proposed \$40 million profit that could conceivably be realized through ACC's sale of its DBS construction permit is an unjust enrichment. Presuming for the sake of discussion that ACC's expenses to pursue its DBS business over the last dozen years or so have amounted to about \$500,000 per year, ACC would have incurred expenses of about \$6 million during the time it held a DBS construction permit. Given a sale price of about \$45 million, ACC would have made a profit of about \$39-40 million on the transaction, all of which would have been taxable as capital gains. ACC's net gains after taxes would be only about \$20-25 million. Given the risks inherent in the DBS industry, we are not persuaded that the Commission can credibly demonstrate that a 3- or 4-to-one return on a \$6 million investment (*i.e.*, earning a net after taxes of about \$20-25 million on an original investment of \$6 million) amounts to unjust enrichment.

26. *Fourth*, the Commission has failed to demonstrate that the proposed public auction will promote an "efficient and intensive use of the electromagnetic spectrum."²⁹ As noted *supra*, the most efficient and intensive use of the electromagnetic DBS spectrum would be to distribute the channels to the surviving permittees.

**V. WHY UTILIZING A PUBLIC AUCTION TO DISTRIBUTE
UNALLOCATED DBS CHANNELS IS UNWORKABLE IN
ITS METHODOLOGY, DISASTROUS IN ITS EFFECT
ON THE AMERICAN PUBLIC, BUT PROFITABLE TO
SHORTSIGHTED POLITICAL INTERESTS ON CAPITOL HILL.**

27. The Commission admits that its proposal to auction the available DBS channels stands under a mandate that it "must supply a reasoned analysis indicating that prior policies

27. 47 U.S.C. § 309(j)(3)(B).

28. 47 U.S.C. § 309(j)(3)(C).

29. 47 U.S.C. § 309(j)(3)(D).

and standards are being deliberately changed, not casually ignored."³⁰ Despite having to meet this high criterion of judgment antecedent to determining that the auction is in the best public interest, the Commission never overcomes the inherent unworkability of its proposed auction. In fact, the very existence of the *NPRM* itself bears stark testimony to the inherent unworkable methodology of the proposed auction. Consider, for example, the following problems *raised by the Commission itself in the NPRM* and for which it seeks public counsel and comment:

- ▶ The Commission appears unsure if the United States "has the authority to auction permits which may include the provision of international service."³¹
- ▶ The Commission's bidding procedures are "overly complex...in relation to the task to be accomplished."³²
- ▶ Not all 30 channels are to be administered by the proposed auction. The two unassigned channels at 61.5° West Longitude have been omitted in the Commission's *NPRM*.
- ▶ The Commission fears that risk of collusion exists in a sealed auction.³³
- ▶ The Commission doesn't know if oral bids would cause problems for "bidders who need time to arrange for additional financing in the course of the auction in the event bidding goes higher than anticipated."³⁴
- ▶ The Commission appears unsure if it should hold "a sequential auction, with the channels at one orbital location being offered immediately after the other."³⁵ Therefore it asks "interested parties to comment on whether there are foreseeable circumstances in which simultaneous auctions of DBS permits would be more appropriate than sequential auctions."³⁶
- ▶ The Commission doesn't know if the bidding should be oral or electronic.³⁷
- ▶ The Commission wonders if the auctioneer should control the pace of the auction.³⁸

30. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Circ. 1970), *cert. denied*, 403 U.S. 923 (1971).

31. *NPRM* at Para. 24, lines 13-15.

32. *Second R&O*, 9 FCC Rcd at 2361.

33. *NPRM* at Para. 81.

34. *Id.* at Para. 82.

35. *Id.* at Para. 80, lines 17-18.

36. *Id.* at lines 19-21.

37. *Id.* at Para. 82, lines 1-2.

38. *Id.* at Para. 82.

- The Commission wonders if maybe a sealed bid-oral outcry auction combination might be appropriate.³⁹

In addition to these nine basic problems, other unanswered questions are raised by the prospect of an auction, including problems with sequencing,⁴⁰ bid increments,⁴¹ the minimum opening bid,⁴² pre-auction application procedures,⁴³ permittee qualifications in light of cross-orbital ownership limitations,⁴⁴ handling of up-front payments,⁴⁵ bid withdrawal, default, or disqualification,⁴⁶ transfer disclosure provisions,⁴⁷ performance incentive requirements,⁴⁸ rules prohibiting collusion,⁴⁹ and provisions for ensuring that small businesses and other specific firms have a place in DBS.

28. **ALL** of these problems (which have been declared by the Commission itself in its *NPRM* to be serious enough to require public comment and advice in order to solve them) can easily be eliminated simply by the Commission keeping the promise that it made to the eligible permittees in *Continental*. But then again, if the Commission proceeds with its planned federal tax on television which has been so cleverly disguised as a "public auction" of "available" DBS frequencies, the United States Government won't get its "auction proceeds" (*i.e.*, its federal television tax money).

VI. WHY 61.5° WEST LONGITUDE SHOULD NOT BE CONSIDERED TO BE A FULL-CONUS ORBITAL ALLOCATION

29. In its *NPRM*, the Commission briefly addresses whether or not DBS orbital location 61.5° West Longitude should be considered to carry a full-CONUS or a half-CONUS broadcast capacity. We suspect that this question is being revisited of late mainly because the Commission proposes "that any DBS licensee or operator affiliated with another MVPD be permitted to control or use DBS channel assignments at only one of the orbital locations capable of full-CONUS transmission."⁵⁰ Accordingly, the real issue at stake in the

39. *Id.* at Par. 83.

40. *Id.* at Para. 84.

41. *Id.* at Para. 85.

42. *Id.* at Para. 86.

43. *Id.* at Para. 88.

44. *Id.* at Para. 89.

45. *Id.* at Para. 90.

46. *Id.* at Para. 95.

47. *Id.* at Para. 98.

48. *Id.* at Para. 99.

49. *Id.* at Para. 100.

50. *NPRM* at Para. 40, lines 3-5.

Commission raising this question is not so much the technical concerns involved as it is the regulatory questions of cross-orbital location ownership of DBS licenses. For example, the Commission declares that:

For the purposes of the spectrum limitation, we propose to include the 61.5° orbital location as being capable of full-CONUS service. Satellites operating from that location can also achieve full-CONUS coverage, although customers on the edges of their transmission area might have to use larger receiving dishes to receive the signal.⁵¹

Ironically, the Commission cites Continental's own engineering data submitted by its vendor to defend "full-CONUS service from the 61.5° orbital location"⁵². As the company that is responsible for that engineering data submitted on 2 October 1995, we respectfully suggest that the Commission has confused the *technical capacity* of the spacecraft which are to be located at 61.5° West Longitude with their *actual operational capacity*. Our east-CONUS spacecraft will place a DBS broadcast signal over the entire continental United States from 61.5° West Longitude because of the nature of the antenna design. But west coast (*i.e.*, Pacific Time Zone) customers will be expected to obtain their signals from 166° West Longitude as will customers in Alaska and Hawaii.

30. Most receiving antenna *look angles* in the Pacific Time Zone -- particularly those obtained in the extreme Pacific Northwest, such as the states of Washington and parts of northern Oregon -- will be far too steep to make signal reception practical. Intervening houses, trees, or other nearby obstructions will make it impractical in several situations for users to obtain signals from 61.5° West Longitude if their receiving antennas are located in the Pacific Time Zone. Continental's west-CONUS orbital location at 166° West Longitude is far better suited for signal reception in these affected areas. Accordingly, the Commission errs by concluding that "customers on the edges of [our] transmission area might have to use larger receiving dishes to receive the signal". The operative factor that will inhibit signal reception in these fringe areas will not necessarily be receiver antenna size, but rather an *insufficient look angle* with respect to the spacecraft at 61.5° West Longitude.

31. To sum up, the Commission's original conclusion that 61.5° West Longitude should be considered a west-CONUS orbital location only is accurate. We believe a more accurate description of the characteristics of that location is that 61.5° West Longitude is an *east 3/4-CONUS* orbital slot that will serve the Mountain, Central, and Eastern Time Zones of the continental United States. Accordingly, the Commission should *exempt* DBS orbital slot 61.5° West Longitude from its proposed ownership cap restrictions, should those restrictions be imposed. Continental's view is that the DBS industry is still too much in its nascent stages to warrant imposition of restrictive regulations at this time.

32. **WHEREFORE**, for the reasons set forth above, if ACC's pending appeal of the Commission's denial of ACC's *Petition for Reconsideration* is not successful, Continental Satellite Corporation respectfully requests that the Commission DISTRIBUTE to existing eligible permittees, pursuant to the commitment it made to those permittees in *Continental* the remaining available DBS channels rather than placing them up for public auction.

51. *NPRM* at Para. 44, lines 3-4.

52. *id.* at Footnote 78.

Respectfully submitted,

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